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DEPUTY

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

UNITED NURSES OF CHILDREN'S  
HOSPITAL,

Petitioner,

vs.  
RADY CHILDREN'S HOSPITAL  
SAN DIEGO,

Respondent.

CASE NO. 12-CV-2552 BEN (BLM)

**ORDER DISMISSING PETITION  
TO CONFIRM ARBITRATION  
AWARD**

[Docket No. 22]

Presently before the Court is Petitioner's Petition to Confirm Arbitration Award. (Docket No. 22.) For the reasons stated below, the Petition is **DISMISSED**.

**BACKGROUND**

Grievant Laureen Smith was employed by Respondent Rady Children's Hospital—San Diego (“Hospital”) as a Nuclear Medicine Technologist beginning in 1998. She was a member of Petitioner United Nurses of Children's Hospital (“Union”). On October 28, 2011, Smith was terminated by the Hospital.

The Hospital and Union are parties to a Collective Bargaining Agreement covering employees employed by the Hospital in the Technical Unit, which was and is in full force and effect from July 1, 2010 to June 30, 2013. (Pet., Exh. A; Kennelly Decl. ¶ 3.) As a member of the Technical Unit represented by the Union, Smith is subject to the terms and conditions of the Collective Bargaining Agreement. (Kennelly

1 Decl. ¶ 4.)

2 The Collective Bargaining Agreement provides that employees can be  
3 discharged or disciplined only for just cause. (Notice of Lodgment ("NOL") 1, at 12.)  
4 It includes a grievance-arbitration procedure allowing the Union to file a grievance and  
5 request arbitration if it believes that the Hospital has violated any provisions of the  
6 Collective Bargaining Agreement. (*Id.* at 12-16.) In addition, the Section 607 of the  
7 Collective Bargaining Agreement limits the authority of the arbitrator:

8 The Arbitrator shall have jurisdiction and authority only to interpret,  
9 apply or determine compliance with the express language of this  
10 Agreement *and* the agreed upon issue(s) submitted to him/her. The  
11 Arbitrator shall not have the power to add to, subtract from, or modify  
12 in any way the express language of this Agreement. The Arbitrator shall  
13 have no authority to and shall not add to or modify in any way [the  
14 Hospital's] responsibilities or duties under this Agreement, nor may the  
15 Arbitrator impose upon [the Hospital] an obligation, responsibility or  
16 duty which is not expressly required of [the Hospital] by an express  
17 provision of this Agreement. . . . [T]he Arbitrator shall have no authority  
18 to review management's exercise of its discretion in selecting the level  
19 of discipline imposed by [the Hospital] in a termination case involving  
gross misconduct. If the Arbitrator finds gross misconduct, the  
termination decision shall be affirmed. If the Arbitrator finds that the  
grievant did not engage in gross conduct but that [the Hospital] did have  
just cause to discipline the employee, the Arbitrator may sustain the  
discharge or otherwise determine the appropriate remedy. In a case  
involving suspension without pay, demotion or disciplinary transfer, the  
Arbitrator shall have the authority to determine whether [the Hospital]  
had just cause to discipline the employee and, if so, what the appropriate  
remedy should be.

20 (*Id.* at 15.)

21 The Union filed a grievance challenging Smith's termination, and the grievance  
22 proceeded to arbitration before Arbitrator Robert R. Petering. Prior to going on the  
23 record, the parties and Arbitrator discussed the statement of issues to be submitted to  
24 the Arbitrator for determination. Union counsel proposed that there should be two  
25 issues submitted for determination: "Did the employer have just cause to terminate the  
26 grievant?" (the merits issue) and "If not, what is the appropriate remedy?" (the  
27 remedial issue). Hospital counsel proposed that only the merits issue should be  
28 submitted for determination, and any remedial issues should be addressed through

1 separate discussions and negotiations if the Arbitrator found that there was no just  
 2 cause to terminate Smith. Union counsel agreed to the Hospital's formulation of the  
 3 issues, and the merits issue was placed on the record.

4 The Arbitrator mailed the parties a copy of his arbitration decision on September  
 5 25, 2012. The Decision states: "At the hearing the parties stipulated that the issue in  
 6 the instant proceeding is: Did the Employer have just cause to terminate the Grievant  
 7 on or about October 28, 2011?" (NOL 3, at 53.) The Arbitrator found that the Hospital  
 8 had not met its burden to prove just cause because it did not present direct evidence  
 9 supporting the allegations in Smith's termination letter. (*Id.* at 58-59.) In addition, the  
 10 Decision included an order determining the remedial issue:

11 **IT IS HEREBY FURTHER ORDERED** that Laureen Smith be  
 12 reinstated forthwith to her former position, or if that position no longer  
 13 exists, to a substantially equivalent position.

14 **IT IS HEREBY FURTHER ORDERED** that the Employer forthwith  
 15 make Laureen whole for any loss of pay, fringe benefits, retirement  
 16 credits, seniority, or any other like or related employment benefits that  
 17 she would have received had she not been discharged on October 28,  
 18 2011.

19 (Id. at 59.)

20 After the Award was rendered, the Hospital filed a "Request to Arbitrator to  
 21 Reconsider Determination of Appropriate Remedy and Inclusion of Order in Decision,"  
 22 objecting to the inclusion of the determination of the remedial issue in the Decision.  
 23 The Arbitrator denied this request, reasoning that "[t]he provisions of Section 607 of  
 24 the collective bargaining agreement covering this case has references to 'make whole  
 25 remedy' and 'interim earnings', clearly showing that the parties knew and intended that  
 26 arbitrators could and would fashion appropriate remedies in cases." (Hayes Decl., Exh.  
 27 A, at 2.)

28 Presently before the Court is the Union's Petition to Confirm Arbitration Award.  
 29 (Docket No. 22.) The Union argues that the Hospital has failed to comply with the  
 30 Arbitrator's Opinion and Award. Specifically, the Union argues that the Hospital has

1 failed to reinstate Smith to her former position or a substantially equivalent position,  
2 failed to make Smith whole for any loss of pay, fringe benefits, retirement credits,  
3 seniority, or any other like or related employment benefit that she would have received  
4 if she had not been discharged.

## 5 DISCUSSION

6 Arbitration is a matter of contract and a party cannot be forced to arbitrate  
7 disputes in the absence of an agreement to do so. *Granite Rock Co. v. Int'l Bd. of*  
8 *Teamsters*, 130 S. Ct. 2847, 2855-56 (2010). It is the function of the court, rather than  
9 the arbitrator, to determine whether the contract requires arbitration of a particular  
10 dispute. *AT&T Techs., Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 649 (1986).  
11 “Unless the parties clearly and unmistakably provide otherwise, the question of  
12 whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.”  
13 *Id.*

14 When the parties have agreed to be bound to an arbitrator’s construction and  
15 interpretation of their agreement, a court may not set aside the arbitrator’s award simply  
16 because the court would have interpreted the agreement in a different manner. *United*  
17 *Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599-600 (1960).  
18 “Nevertheless, an arbitrator is confined to interpretation and application of the  
19 collective bargaining agreement; he does not sit to dispense his own brand of industrial  
20 justice. . . . [H]is award is legitimate only so long as it draws its essence from the  
21 collective bargaining agreement. When the arbitrator’s words manifest an infidelity to  
22 this obligation, courts have no choice but to refuse enforcement of the award.” *Id.* at  
23 597.

24 Courts may vacate an arbitrator’s award if the award exceeds the authority given  
25 to the arbitrator by the parties or if the arbitrator ignores the language of the agreement  
26 that limits the scope of the arbitrator’s authority. *United Paperworkers Int'l Union v.*  
27 *Misco, Inc.*, 484 U.S. 29, 38 (1987). If the arbitrator’s interpretation is contradicted by  
28 the plain language of the parties’ agreement or the issue submitted to the arbitrator for

1 determination, the award cannot stand. *Hughes Aircraft Co. v. Elec. & Space*  
 2 *Technicians*, 822 F.2d 823, 826-27 (9th Cir. 1987). An arbitration award is properly  
 3 vacated when: (1) the arbitrator does not attribute the usual meaning to words in a  
 4 written instrument, *United Food & Commercial Workers Union v. United Markets*, 784  
 5 F.2d 1413, 1415 (9th Cir. 1986); (2) the arbitrator disregards a specific contract  
 6 provision because the arbitrator does not believe it is appropriate or would create “an  
 7 injustice,” *Pac. Motor Trucking Co. v. Auto. Machinists Union*, 702 F.2d 176, 177 (9th  
 8 Cir. 1983); or (3) the award violates the terms of the arbitration clause, *Federated*  
 9 *Emp’rs of Nev. v. Teamsters Local No. 631*, 600 F.2d 1263, 1264 (9th Cir. 1979).

10 Here, Section 607 of the Collective Bargaining Agreement sets forth the general  
 11 scope of the Arbitrator’s authority and power: “The Arbitrator shall have jurisdiction  
 12 and authority only to interpret, apply or determine compliance with the express  
 13 language of this Agreement *and* the agreed upon issue(s) submitted to him/her.” (NOL  
 14 1, at 15 (emphasis added)). The parties dispute whether this means that the Arbitrator  
 15 has authority to interpret only issues that are *both* discussed in the Agreement *and*  
 16 submitted to the arbitrator by the parties (the Hospital’s position), or the Arbitrator has  
 17 authority to interpret issues that are *either* discussed in the Agreement *or* submitted to  
 18 the arbitrator by the parties (the Union’s position).

19 The Court finds that the Arbitrator has the authority to interpret only issues that  
 20 are both discussed in the Agreement and submitted to the arbitrator by the parties.  
 21 First, the common usage of the words supports this interpretation. The use of the  
 22 conjunction “and,” rather than “or,” in Section 607 implies that both conditions must  
 23 be met—the issues must be *both* discussed in the Agreement *and* submitted to the  
 24 arbitrator by the parties in order for the Arbitrator to have authority to interpret them.  
 25 See *United Markets*, 784 F.2d at 1415-16 & n.2 (court should apply the words included  
 26 within the agreement in accordance with their normal usage unless the parties have  
 27 ascribed a particular meaning to them).

28 Second, “a document should be read to give effect to all its provisions and to

1 render them consistent with each other.” *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995). If the arbitrator is free to ignore the provision that it shall  
 2 only have authority to determine the agreed upon issues submitted to the arbitrator by  
 3 the parties, and instead rely on other language in the agreement as providing authority  
 4 to decide an issue that both parties have not agreed to submit, the “agreed upon issue(s)  
 5 submitted” language becomes nugatory.  
 6

7 Here, the only agreed upon issue submitted to the arbitrator was the merits issue.  
 8 (NOL 2, at 42.) Because the Arbitrator included his determination on the remedial  
 9 issue that was not submitted to him for determination, the Arbitrator exceeded the  
 10 power conferred upon him by the Collective Bargaining Agreement and the parties’  
 11 agreed upon submission. Moreover, to the extent the order on the remedial issue was  
 12 included in the Decision as a determination by the Arbitrator that the Hospital was  
 13 compelled to arbitrate remedial issues because of the “just cause” issue, generally, no  
 14 deference is given to the Arbitrator’s determination of arbitrability. *See Carpenters 46*  
 15 *N. Cal. Counties Conference Bd. v. ZCON Builders*, 96 F.3d 410, 414 (9th Cir. 1996).

16 The Union argues that the language of Section 607 that references “back pay and  
 17 benefits (make whole remedy),” permits the Arbitrator to determine a remedy. Section  
 18 607, however, lists specific instances in which the Arbitrator may determine remedial  
 19 issues. It does not grant the Arbitrator authority to determine remedial issues in all  
 20 situations. For instance, Section 607 expressly confers on the Arbitrator in a case *not*  
 21 involving termination the authority to determine remedial issues. (See NOL 1, at 15.)  
 22 In addition, Section 607 confers authority on the Arbitrator to determine remedial  
 23 issues in termination cases involving gross misconduct. (*Id.*) However, no such  
 24 authority is given in cases involving termination that does not involve gross  
 25 misconduct.

26 In addition, the Union argues that the past behavior of the parties indicate that  
 27 the arbitrator had authority to order reinstatement and a make whole remedy. *In the*  
 28 *Matter of Arbitration between Rady Children’s Hospital—San Diego and United*

1 *Nurses of Children's Hospital (Phillip Atencio)* (Steinberg 2010) is the only other  
 2 grievance between the parties over a termination that resulted in a decision rendered  
 3 by an arbitrator since the Union's inception in 1999. In that case, the Arbitrator  
 4 ordered reinstatement and a make whole remedy. (Kennelly Decl. ¶ 15, Exh. A, at 20.)  
 5 As the Union points out, the Hospital did not raise the issue that the arbitrator lacked  
 6 authority or jurisdiction to order reinstatement and a make whole remedy. In that case,  
 7 however, the parties stipulated to place both a merits issue and a remedial issue before  
 8 the arbitrator. *Id.* at 1. *Atencio*, therefore, does not show that the Arbitrator had  
 9 authority under the parties' Collective Bargaining Agreement to decide remedial issues  
 10 in the absence of an agreed upon submission expressly allowing him to do so.

11 Accordingly, the Union's Petition is **DISMISSED**. The portion of the  
 12 Arbitrator's Decision setting out a remedial order is **VACATED** pursuant to 9 U.S.C.  
 13 § 10(a)(4) as being beyond the power of the Arbitrator. In addition, because the Court  
 14 dismisses the Union's Petition, the Union's motion for an award of attorney's fees is  
 15 **DENIED**. To the extent not inconsistent with the findings contained herein, the Court  
 16 **OVERRULES** the Respondent's Evidentiary Objections to Petitioner's Submissions  
 17 in Support of Opposition to Motion on Petition to Confirm Arbitration Award (Docket  
 18 No. 20-2) and Petitioner's Evidentiary Objections to Respondent's Opposition Brief  
 19 and Declaration in Support of Opposition Brief and Motion to Strike (Docket No. 22-  
 20 1).

## 21 CONCLUSION

22 For the reasons stated above, the Union's Petition is **DISMISSED**. The portion  
 23 of the Arbitrator's Decision setting out a remedial order is **VACATED** pursuant to 9  
 24 U.S.C. § 10(a)(4) as being beyond the power of the Arbitrator.

25 **IT IS SO ORDERED.**

26  
 27 DATED: May 17, 2013

  
 28 HON. ROGER T. BENITEZ  
 United States District Court Judge